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Supreme Court, U.S.
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No. 92-980

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES J. HOLT,

Petitioner,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS, Michigan State Industries,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I

WHETHER THE CIVIL RIGHTS ACT OF 1991 SHOULD BE GIVEN RETROACTIVE EFFECT.

II

WHETHER PETITIONER'S CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT.

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STATEMENT OF THE CASE

Petitioner, Charles J. Holt, is a State classified civil servant who occupies a position in the Bureau of Michigan State Industries (MSI) in the Michigan Department of Corrections. He alleges that MSI has discriminated against him and other African-American employees in hirings and promotions because of his race and that he and other African-American employees have been subjected to racial harassment. He brings suit under the Civil Rights Act of 1866, 42 U.S.C. § 1981, seeking monetary damages and prospective injunctive relief. Respondents raised numerous defenses including that the Eleventh Amendment bars this action completely; that the applicable statute of limitations bars Petitioner's only true failure to hire claim and much of the rest of his claim; that Petitioner

has failed to make a prima facie case of intentional race discrimination, as required under 42 U.S.C. § 1981 or, alternatively, that Respondents were entitled to summary judgment because they articulated legitimate, non-discriminatory reasons for not promoting Petitioner about which Petitioner cannot raise a genuine issue of material fact.

The District Court ruled generally that pursuant to Eleventh Amendment immunity, the monetary damage request of Petitioner's complaint must be dismissed. (Opinion, p 2-3; App. to Pet. 22). Additionally, the Court addressed the question of injunctive relief available, both as to the original Respondents, State of Michigan and Michigan State Industries, and as to the individuals named in a pro-

posed Amended Complaint. In denying injunctive relief, the Court found that "in general, section 1981 prohibits discrimination in the making and enforcement of contracts. Patterson v. McLean Credit Union, 491 US 164, 176 (1989)." (Opinion, p 3; App. to Pet. 23). The Court said that in order for post-formation conduct to come under the purview of § 1981, it must call for the opportunity of a new relationship between the employee and the employer. (Opinion, p 3; App. to Pet. 23). The District Court dismissed Petitioner's complaint in its entirety, and denied the motion to amend the complaint to add individual defendants. (Judgment; App. to Pet. 20).

On appeal, the United States Court of Appeals for the Sixth Circuit on

September 11, 1992, issued its Opinion affirming the District Court's summary judgment based primarily upon this Court's holding in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), overruled by Civil Rights Act of 1991, P.L. 102-166. In so ruling, the Court did not consider the other bases for a grant of summary judgment including Petitioner's Eleventh Amendment claims. The Court found specifically that the Civil Rights Act of 1991 was not retroactive and relied upon this Court's decision in Patterson, supra.

SUMMARY OF REASONS FOR DENYING THE WRIT

The sole issued presented by Petitioner is whether 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991,

P.L. 102-166, should be given retroactive effect. The holding by this Court in Patterson v. McLean Credit Union, supra, was clear. An employee's claim of racial harassment arising after the formation of the contract or initial employment of the individual which does not interfere with the enforcement of established contractual obligations, is not actionable under 42 U.S.C. § 1981 as it existed prior to enactment of the Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1071 et. seq. Among other changes, the Civil Rights Act of 1991 included the profound modification of 42 U.S.C. § 1981, as interpreted by this Court in Patterson, supra.

While Petitioner has asserted that there is conflict in the district courts

with regard to retroactivity of the Civil Rights Act of 1991, there is no conflict between the federal appellate courts in reported decisions. Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir., 1992); Johnson v. Uncle Ben's Inc., 965 F.2d 1363 (5th Cir., 1992); Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir., 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir., 1992).

A most recent discussion of retroactivity by this Court is the unanimous decision in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), where this Court stated:

> ... Retroactivity is not favored in the law. Thus, congressional enactments ... will not be construed to have retroactive effect unless their language requires this result.

There is no language in the statute itself indicating that the statute should be given retroactive effect. There is no conflict of federal appellate decisions requiring resolution by this Court and therefore, no important question of federal law warranting review. Furthermore, all of Petitioner's claims against these Respondents are barred by the Eleventh Amendment. Accordingly, the Petition for Writ of Certiorari should be dismissed.

ARGUMENT

I

42 U.S.C. § 1981, AS AMENDED BY THE CIVIL RIGHTS ACT OF 1991, P.L. 102-166, 105 STAT. 1071 ET. SEQ. SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

"Retroactivity is not favored in the law." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (citation omitted). While Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974), indicated a court should apply the law in effect at the time a decision is rendered unless that would result in manifest injustice or would be contrary to Congressional intent, the more recent and unanimous decision of this Court in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988), indicated that statutes should not apply

retroactively unless required by the language of the statute itself. At one point, this Court declared that retroactivity "'even where permissible, is not favored, except upon the clearest mandate.'" In re Dist of Columbia Workmens' Compensation Act, 554 F.2d 1075, 1079 (D.C. Cir., 1976) (quoting Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1952), cert. den. sub. nom. J. Frank Kelly, Inc. v. Swinton, 429 U.S. 820 (1976).

The firm basis for the proposition that retroactivity is not favored, especially in the context of the Civil Rights Act of 1991, was stated by Judge Posner of the Seventh Circuit and quoted by the Sixth Circuit in the instant case:

> The idea that the law should confine its prohibitions and regulations to future conduct, so that the persons

> subject to the law can conform their conduct to it and thus avoid being punished, whether criminally or civilly for conduct that they had no reason to think unlawful, is a component of the traditional conception of the "rule of law". Except as codified in constitutional provisions ... the traditional conception is neither immunable or absolute. But we think that conformity to it is the right policy for courts to follow in default of other guidance.
> Ludington v. Indiana Bell Telephone Co., 1992 U.S. App. Lexis No. 91-2320 (7th Cir., June 15, 1992) at 6-7 as quoted in Holt v. Michigan Dep't. of Corrections, No. 91-2034 (6th Cir., September 11, 1992) at 6.

A. The Plain Language Of The Civil Rights Act Of 1991 Does Not Apply For Retroactive Application.

In Hameister v. Harley Davidson, 785 F. Supp. 113 (Wis. E.D., 1992), the court recognized that the Civil Rights Act of 1991 has no specific language as to the retroactive effect of most of its provisions:

> Federal courts have long relied on a presumption against the retroactive

> application of statutes: statutes are to be applied prospectively absent a clear statutory mandate to the contrary. As recently declared by Justice Kennedy, writing for a unanimous court in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) "retroactivity is not favored in the law. Thus, congressional enactments ... will not be construed to have retroactive effect unless their language requires this result."
> Hameister, supra, at p 2.

The Court further noted that the Equal Employment Opportunity Commission issued a notice that it will follow the Georgetown decision regarding compensatory and punitive damages under the Act. This clearly indicates that the administrative agency charged with enforcement of the act, whose opinion should be given great deference, believes that the act, at least in part, should be given only prospective application.

In a similar vein, on remand in Patterson v. McLean Credit Union itself, the district court found that the act should be given prospective relief only. 1991 U.S. Dist. Lexis 1989, Case No. C-84-73-WS (February 18, 1992, D.C. Middle Dist.-NC). In this lengthy opinion, the district judge reviewed all cases that had been decided to date under the Civil Rights Act of 1991 which considered the issue of the applicable date. The court distinguished each and every case that applied retroactive effect and after completing the analysis found:

> The language of the statute provides no indication that Congress intended retroactive application of the act, and the court will not read such a requirement into the statute. McLean at p 17.

The court recognized that the plain meaning of the statute controls. The

act, lacking any indication of retroactive effect, cannot possibly be construed to govern events occurring prior to November 21, 1991. McLean, supra, at p 17. This conclusion is consistent with existing case law. McLean, at p 19.

> Retroactive application of legislation is unfair, unfair to the citizenry making an attempt to guide its activities by the rule of law. To be forced to conduct one's life and one's business in the fear that a legislative body may later declare that conduct illegal is antithetical to the notions of justice and fair play that undergird our legal system.
> McLean, at p 34.

Accord Curry v. Chicago Central & Pacific RR Co., 1992 U.S. Dist. Lex No. 1734, Case No. C-90-2013 59 FEP Cases 820 (February 9, 1992, Iowa N.D.); High v. Broadway Industries, 1992 U.S. Dist. Lexis 446, Case No. 90-1066-CU-W-3; 57

FEP Cases 1159 (January 7, 1992, D.C., W.D. Mo).

Therefore, the great weight of authority based upon the most recent pronouncement of this Court is that statutes must be given prospective effect unless the statute's own terms clearly indicate to the contrary. All federal courts of appeal that have considered this issue have followed the mandate of this Court and the great weight of authority and have given prospective effect only to the Civil Rights Act of 1991. There is, accordingly, no conflict between the appellate courts requiring this Court to consider the issue.

B. Legislative History Establishes That The Civil Rights Act Should Not Be Given Retroactive Effect.

Legislative history appears to indicate that Congress intended to prevent

the Civil Rights Act of 1991 from having retroactive effect. Senator Danforth stated on the Senate floor:

> In my review of Supreme Court case law supports my reading that in the absence of an explicit provision to the contrary, no new legislation is applied retroactively. Rather, new statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance. 135 Cong. Rec. S 15,438 (Daily Ed. Oct. 30, 1991).

Senator Danforth also submitted an interpretative memorandum that concluded "this legislation ... shall not apply retroactively." Id. at S 15,485. This is consistent with statements of Senator Dole, Id. at S 15,478 and Senator Murkowski, Id. at S 15,493.

Furthermore, the absence of indication by the Congress that the statute

should be given retroactive effect is made even more compelling by the existence of other statutes which do contain specific language providing for retroactivity. 30 U.S.C. § 945 P.L. No. 101-386, S2, 104 S. Stat. 739 (1990); 12 U.S.C. § 1449bb-9; 19 U.S.C. § 1671D(b)(4).

Thus, there is an absolute absence of indication either in the specific language of the statute or in the Congressional debates that the Civil Rights Act of 1991 should be given retroactive effect. "Where the congressional intent is clear, it governs." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990).

II

PETITIONER'S CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT.

The only Respondents are State departments or agencies. Petitioner's motion to add individual defendants was denied. In these circumstances it is beyond dispute that all of Petitioner's claims are barred by U.S. Const. Am. 11. "It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. *** This jurisdictional bar applies regardless of the nature of the relief sought." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984).

CONCLUSION

For all the foregoing reasons, Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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